

AMENDMENTS TO USCIT R. 26

RULE 26 is amended as follows:

RULE 26. General Provisions Governing Discovery; **Duty of Disclosure**

~~[(a) *Discovery Methods*. Parties may obtain discovery by one of more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission.]~~

~~[(b) *Discovery Scope and Limits*. Unless otherwise limited by order of the court as prescribed by these rules, the scope of discovery is as follows:]~~

~~[(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.]~~

~~[The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).]~~

~~[(2) *Insurance Agreements*. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify~~

~~or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.]~~

~~[(3) Trial Preparation — Materials. Subject to the provisions of paragraph (4) of this subdivision (b), a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subdivision (b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.]~~

~~[A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.]~~

~~[(4) Trial Preparation — Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this subdivision (b) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:]~~

~~[(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each~~

~~opinion.]~~

~~[(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subparagraph (4)(C) of this subdivision (b), concerning fees and expenses as the court may deem appropriate.]~~

~~[(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial, only as provided in Rule 35(b), or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.]~~

~~[(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subparagraphs 4(A)(ii) and 4(B) of this subdivision (b); and (ii) with respect to discovery obtained under subparagraph (4)(A)(ii) of this subdivision (b) the court may require, and with respect to discovery obtained under subparagraph (4)(B) of this subdivision (b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.]~~

~~[(c) *Protective Orders.* Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, delay or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.]~~

~~[If the motion for a protective order is denied in whole or in part, the court may, on such terms as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.]~~

~~[(d) *Sequence and Timing of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.]~~

~~[(e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:]~~

~~[(1) A party under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.]~~

~~[(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.]~~

~~[(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.]~~

~~[(f) *Discovery Conference.* At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:]~~

- ~~[(1) A statement of the issues as they then appear;~~
- ~~_____ (2) A proposed plan and schedule of discovery;~~
- ~~_____ (3) Any limitations proposed to be placed on discovery;~~

~~_____ (4) Any other proposed orders with respect to discovery;
_____ and]~~

~~[(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.]~~

~~[Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.]~~

~~[Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a postassignment conference authorized by Rule 16.]~~

~~[(g) *Signing of Discovery Requests, Responses and Objections.* Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address and telephone number. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.]~~

~~[If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.]~~

~~[(h) Costs. All costs, charges, and expenses incident to taking depositions shall be borne by the party making application for the same unless otherwise provided for by stipulation or by order of the court.]~~

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(2) Disclosure of Expert Testimony.

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the

parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless otherwise directed by order, all disclosures under paragraphs (2) and (3) shall be made in writing, signed and served, but not filed with the court.

(b) Discovery Scope and Limits. Unless otherwise limited by

order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of

an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert of a party who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged

or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Conference of Parties; Planning for Discovery. Except when otherwise ordered, the parties shall, as soon as practicable after the filing of a complaint, and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the conference a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law:

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in

the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(h) Costs. All costs, charges, and expenses incident to taking depositions shall be borne by the party making application for the same unless otherwise provided for by stipulation or by order of the court.

PRACTICE COMMENT: Rule 26(a)(2) requires disclosure of certain information concerning expert witnesses. Practitioners who are familiar with Fed. R. Civ. P. 26(a)(2) should note that USCIT R. 26(a)(2) is more expansive. The Federal Rule only applies to a witness who is retained or specially employed to testify as an expert, including any employee of a party whose duties "regularly involve giving expert testimony." The CIT rule makes no distinction among experts, whether they are outside experts specially retained by a party, in-house employees whose duties regularly involve giving expert testimony, or employees who do not routinely testify as experts, but do so in a specific case.

PRACTICE COMMENT: Rule 26(f) requires the parties to confer "as soon as practicable after the filing of a complaint, and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)...." However, time permitting, parties may frequently find it more practical to confer after the answer has been filed.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; _____, 2000, eff. _____, 2000.)

ADVISORY COMMITTEE NOTE

Rule 26 is the linchpin of the civil discovery process. There are substantial differences between USCIT R. 26 ("General Provisions Governing Discovery") and Fed. R. Civ. P. 26 ("General Provisions Governing Discovery; Duty of Disclosure").

With the exception of Fed. R. Civ. P. 26(a)(1), the Committee recommends that Fed. R. Civ. P. 26 essentially replace USCIT R. 26, with certain modifications to adapt it to the unique nature of practice in the CIT. The Committee also recommends two Practice Comments to assist users of the rule. A subdivision-by-subdivision analysis is presented below.

Subdivision 26(a)(1). Fed. R. Civ. P. 26(a)(1) requires early disclosure of four categories of information without court order or formal discovery. While this rule may serve to facilitate disclosure in certain types of civil actions in the district courts, the 1993 amendments to the Fed. R. Civ. P. (the "Amendments"), which adopted sweeping changes in the discovery rules, permitted district courts by local rule, to exempt all or particular types of cases from these disclosure requirements or to modify the nature of the information to be disclosed. Accordingly, the USCIT Advisory Committee that previously studied the discovery rules made the following recommendation:

[E]ffort should be expended by the next Committee in determining how best, where appropriate, to bring the rules of discovery (USCIT Rules 26-37) into conformity with Fed. R. Civ. P. 26-37. It is the view of this Committee that, although the justification for certain differences may continue, the differences should be reconsidered after the District Courts have had more experience with the rules and the option to 'opt out' in whole or in part."¹

The Court accepted that recommendation.

¹Letter of December 19, 1997 from Terence P. Stewart to Honorable Gregory Carman.

The response of the various judicial districts to Rule 26(a)(1) has been mixed, at best:

Altogether, just over half the districts have implemented 26(a)(1) . . . Of the forty-five districts that have not implemented Rule 26(a)(1), three require initial disclosure through local rules, orders or CJRA [Civil Justice Reform Act of 1990] plan, one requires disclosure in a specified set of case types, and eighteen specifically give individual judges authority to require initial disclosure. In only twenty-three courts, then, are all cases routinely exempt from any rules -- federal or local -- requiring initial disclosure."²

In view of the lukewarm response to the initial disclosure requirements, the current Committee shares the view of the prior USCIT Advisory Committee that the CIT should not adopt Fed. R. Civ. P. 26(a)(1) unless and until it is appropriately amended to ensure uniformity throughout the entire federal district court system.

Subdivision 26(a)(2).

Federal Rule 26(a)(2) requires disclosure of certain information concerning expert witnesses. The rule applies to a witness who is retained or specially employed to testify as an expert, including any employee of a party whose duties "regularly involve giving expert testimony." An employee of a party who does not regularly testify as an expert, but may testify as an expert in a particular case, is not mentioned. Although the CIT has not previously adopted a rule implementing the precise requirements of Fed. R. Civ. P. 26(a)(2), some judges, through scheduling orders and/or chambers procedures, have required the disclosure of a report of all expert witnesses, often characterized as a "summary of the expert's testimony." Such report has included not only those outside experts "specially retained" by a party, but also in-house experts, with no distinction being drawn between those in-house employees whose regular course of employment includes giving expert testimony and those employees who, while not routinely testifying as experts, will testify as such in a specific case. Some decisions by U.S. Magistrate Judges have recognized that

²See D. Stienstra, Implementation of Disclosure in the United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, 4-5 (FJC March 30, 1998).

the language of Rule 26(a)(2), if read literally, exempts regular employee experts from the disclosure requirements of this rule, resulting in an anomaly and not fulfilling the benefits of early disclosure foreseen by the judicial system.³ While the magistrate opinions interpret Fed. R. Civ. P. 26(a)(2) to prevent this undesirable result, those opinions are not controlling precedent in the entire district court system. However, in light of the existing practice, and the regularity with which employees of parties testify as expert witnesses in the CIT, the rationale of the magistrate decisions suggests that the CIT should adopt a modified version of Rule 26(a)(2) that would eliminate ambiguity and conform to the practice already followed by many CIT judges.

Actions tried de novo in the CIT routinely involve expert witnesses called by one or both sides. Consequently, the Committee recommends that the CIT adopt a modified version of Fed. R. Civ. P. 26(a)(2) that requires the disclosure of all expert witnesses and that the reports of those witnesses also be produced within the time prescribed by the rule. Under Rule 26(a)(2)(B) and (C), the parties can stipulate, or the court may direct, more limited disclosure or alternative time periods. The Committee believes that adoption of the rule, as modified, may eliminate the need for unnecessary depositions that might have been taken absent receiving the report, simplify the other party's preparation for depositions should the report suggest that a deposition is warranted, and facilitate the early retention of rebuttal experts. Finally, the Committee recommends the adoption of a practice comment alerting practitioners to the difference between the Federal Rule and the CIT Rule regarding expert witnesses.

Subdivision 26(a)(3). Subdivision (a)(3) of the Federal Rule imposes an obligation to disclose, without request or special order of the court, information routinely needed in final preparation for trial. While USCIT R. 40(c) currently requires that all trial exhibits be pre-marked and shown to the other parties before trial, some judges have, as part of their chambers procedures and/or pre-trial orders, required that parties make the disclosure now required under Fed. R. Civ. P. 26(a)(3). Although the rule still permits the judges of the court to establish other time periods for the required disclosure, adoption of the rule provides for greater uniformity and earlier disclosure, reducing surprise and facilitating each party's preparation.

Subdivision 26(a)(4). Subdivision (a)(4) of the Federal Rule provides that the required disclosures should be filed unless directed otherwise

³See Minnesota Mining and Manufacturing Co. v. Signtech USA, Ltd., 177 F.R.D. 459 (D. Minn. 1988, citing to Day v. Consolidated Rail, Corp., 1996 WL 257654 (S.D.N.Y. 1996)).

by local rule or the court. However, the CIT has indicated in its current rules (e.g., Rule 5(d), 31(c)) that it ordinarily does not want discovery documents filed and, consistent with that policy, the Committee recommends that a modified version of Fed. R. Civ. P. 26(a)(4) be adopted that directs non-filing of disclosure materials unless ordered by the court or needed for trial.

Subdivision 26(a)(5). This provision is substantially similar to existing USCIT R. 26(a). The Committee recommends that it be adopted and renumbered as Rule 26(a)(1) to avoid the need to renumber the other paragraphs of subdivision (a).

Subdivision (b). Subdivision (b)(1) of the Federal Rule is nearly identical to the first paragraph of CIT R 26 (b)(1). Subdivision (b)(2) of the Federal Rule is virtually identical to the second textual paragraph of CIT R 26(a)(1) except that the Federal Rule allows the court to place limitations on discovery. The Committee recommends adopting the Federal Rule. USCIT R 26(b)(2) provides for the discovery of insurance agreements. A provision providing for the early disclosure of insurance agreements appears in Fed. R. Civ. P. 26(a)(1)(D). Since the Committee is not recommending adoption of Fed. R. Civ. P. 26(a)(1), it recommends that the current provision in the CIT rules regarding discovery of insurance agreements be retained but renumbered as Rule 26(b)(6), which will thereby continue the congruity between the CIT and Federal Rules 26(b)(3) and (4) (which are substantially similar) and allow for the adoption of Fed. R. Civ. P. 26(b)(5) in its current place.

With respect to the limited discovery of an expert who is not expected to be called as a witness, the language in Fed. R. Civ. P. 26(b)(4)(B) -- "who has been retained or specially employed by another party in anticipation of litigation or preparation for trial . . ." -- is excluded from proposed CIT Rule 26(b)(4)(B) to make it harmonious with proposed CIT Rule 26(a)(2). Subdivision (b)(5) of the Federal Rules, which requires a party to provide certain details regarding information withheld as privileged or trial preparation material, does not have a comparable provision in the CIT Rules and the Committee recommends adoption.

Subdivision (c). The Federal Rule and CIT rule are similar but the Federal Rule requires consultation and certification by the party seeking a protective order. The Committee recommends its adoption.

Rule 26(d) and (f). Fed. R. Civ. P. 26(d) prohibits discovery before the meeting of counsel provided for in Rule 26(f). Corresponding provisions tying discovery to the Rule 26(f) meeting appear in the provisions governing the specific form of discovery: i.e. Depositions

Upon Oral Examination (Rule 30), Depositions Upon Written Questions (Rule 31), Interrogatories (Rule 33), Production of Documents and Things (Rule 34), and Requests for Admission (Rule 36). The Rule 26(f) meeting must occur "as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16" At the Rule 26(f) meeting, the parties must, among other things, "develop a proposed discovery plan." Hence, discovery is not to commence until the meeting of counsel. The CIT rules tie commencement of discovery to the service of the complaint (Rule 30(a); Rule 31(a)) or to the filing of the complaint upon plaintiff and the service of the summons and complaint on any other party (Rule 33(a); Rule 34(a); Rule 36). The Committee recommends adoption of Fed. R. Civ. P. 26(d). It also recommends adoption of Fed. R. Civ. P. 26(f), modified as follows:

(f) Meeting of Parties; Planning for Discovery.

~~Except in actions exempted by local rule or~~ when otherwise ordered, the parties shall, as soon as practicable **after the filing of a complaint** and in any event

The modification would preclude a party from seeking a Rule 26(f) conference and/or related discovery after service of the summons alone. At the same time, since the conference may be held "as soon as practicable after filing of the complaint," the parties have an opportunity to confer and establish the discovery plan early in the litigation process. While, in theory, a party could attempt to stall another party's discovery by refusing to confer under Rule 26(f), the discovery rules allow the parties to move for discovery, which should discourage another party from attempting unreasonable delay.

The proposed rule eliminates a discovery conference with the court, leaving it up to the parties. In view of the national jurisdiction of the Court and the fact that it may be burdensome for attorneys to physically meet with Department of Justice attorneys in New York, the Committee recommends "conference" rather than "meeting" in proposed Rule 26(f), so that the parties may confer by teleconference.

The parties must submit their discovery plan to the Court. The suggested form of the report appears as Form 35 in the Fed. R. Civ. P. The Committee recommends that a similar form, adapted to CIT practice, be included in the Appendix to the CIT Rules and identified as Form 19.

Finally, while the rule provides for the attorney's conference to be held as soon as practicable after the filing of a complaint and in any event at least 14 days before a scheduling conference is held or a

scheduling order is due under Rule 16(b), it is the Committee's view that frequently the parties may find it more practical to wait to confer until after an answer has been served. A practice comment to that effect appears at the end of the rule.